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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/699,469	10/31/2003	Heather Lynn Focht	9081M	2774

27752 7590 02/02/2006

THE PROCTER & GAMBLE COMPANY
INTELLECTUAL PROPERTY DIVISION
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EXAMINER

OGDEN JR, NECHOLUS

ART UNIT	PAPER NUMBER
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1751

DATE MAILED: 02/02/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/699,469

Applicant(s)

FOCHT ET AL.

Examiner

Necholus Ogden

Art Unit

1751

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 08 December 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-20 and 22-39 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-20 and 22-39 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>12-08-2005</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 12-08-2005 has been entered.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

3. Claims 7, 13, 18, 26, 32, and 37 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter, which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

4. Claims 7 and 26 state the phrase "substantially free of surfactant", however, the examiner asserts that the support for said terminology cannot be found in applicant's disclosure. Appropriate clarification and/or corrections are required.

5. Claims 13 and 32 state the range of "3 to about 60%" by weight of a cleansing phase. The examiner contends that said range is not supported by applicants'

Art Unit: 1751

disclosure. The examiner asserts that applicant does have support for 1 to 50%; 5-25% and 4-30% as stated on page 5, lines 21-25 of applicant's specification, but it appears the range in question is not supported by applicant's disclosure. Appropriate clarification and/or corrections are required.

6. Claims 18 and 37 state the component "cationic polymer". The examiner asserts that applicant's disclosure does not support the inclusion of any cationic polymer in any proportion. It is noted that applicant does include specific cationic polymers in the examples in specific proportions, however, it appears that the aforementioned claims are not supported for any cationic polymer in any proportions. Appropriate clarification and/or corrections are required.

Claim Rejections - 35 USC § 103

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

9. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

10. Claims 1-13, 16-20, 22-32 and 35-39 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mitra (6,534,457) or Hayward et al (6,534,456).

Mitra or Hayward et al discloses a plurality of liquid cleansing compositions in lamellar phase, which are contained in partionless container. The multiphase composition is stable upon storage and is dispensed as striped product where typically one stripe has a cleansing function and a second stripe has a moisturizing function (see abstract, respectively). Mitra or Hayward et al further teach that said compositions have a viscosity of at least about 80,000 centipoise and are stable for at least 4 months at room temperature (col. 3, line 55-col. 4, line 25 and col. 4, lines 5-47, respectively). With respect to the cleansing compositions, Mitra or Hayward et al teach that said compositions comprise at least 5% by weight of a cleansing composition (col. 4, lines 49-65 and col. 5, lines 9-25); lamellar structurants such as fatty alcohols, esters or trihydroxstearin (col. 9, lines 15-35 and col. 10, lines 1-10, respectively); emollients in an amount from 0 to 70% by weight and comprise lanolin alcohols, lanolin, triglycerides,

Art Unit: 1751

esters, silicone oils such as dimethicone and fatty acid oils (col. 9, lines 39-67 and col. 10, lines 18-44, respectively). Mitra or Hayward et al specifically teach that said compositions include titanium dioxide or zinc stearate particles, cationic conditioning agents, antibacterial, antioxidants and viscosity adjusting agents (col. 10, lines 4-38 and col. 11, lines 1-25, respectively). With respect to the container, Mitra or Hayward et al teach that said containers are transparent (col. 11, lines 1-5 and col. 12, lines 25-35, respectively). See examples 1 and table 2, respectively).

Mitra or Hayward et al do not specifically teach with sufficient specificity applicant's stripe size width, Shear Index or Consistency value, however, it would have been obvious to one of ordinary skill in the art to produce a stripe of at least 1mm in width and length because Mitra or Hayward et al each teach the specific surfactants, emollients in their requisite proportions wherein, absent a showing to the contrary, one of ordinary skill would have expected the stripes to form in said measurements and the compositions to encompass the Shear Index or Consistency value. Furthermore, it is held that "it is not necessary in order to establish a prima facie case of obviousness . . . that there be a suggestion or expectation from the prior art that the claimed [invention] will have the same or a similar utility as one newly discovered by applicant," and concluded that here a prima facie case was established because "[t]he art provided the motivation to make the claimed compositions in the expectation that they would have similar properties." 919 F.2d at 693, 16 USPQ2d at 1901.

11. Claims 14-15 and 33-34 rejected under 35 U.S.C. 103(a) as being unpatentable over Mitra (6,534,457) or Hayward et al (6,534,456) in view of Williams et al (6,429,177).

12. Mitra (6,534,457) or Hayward et al (6,534,456) are relied upon as set forth above. Specifically, Mitra (6,534,457) or Hayward et al (6,534,456) do not teach an electrolyte component.

13. Williams et al disclose a separating multiphase wash composition in a transparent container, wherein said composition comprises surfactants, thickeners, polyols and electrolytes (col. 2, line 45-col. 3, line 5). Williams et al teach that said electrolyte comprises salts of sulfates, carbonates and bisulphates (col. 3, lines 28-33) in an amount from less than 25% by weight.

14. It would have been obvious to one of ordinary skill in the art to include the electrolyte of Williams et al to the compositions of Mitra (6,534,457) or Hayward et al (6,534,456) because Mitra or Hayward et al teach multiphase compositions and Hayward et al suggests electrolytes are included in aiding in phase separation or portioning of layers (col. 2, lines 15-21). Therefore, absent a showing to the contrary, one of ordinary skill would have been motivated to include the electrolyte to further induce stripe separation as suggested by Williams et al.

Double Patenting

15. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory

Art Unit: 1751

obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

16. Claims 1-20 and 22-38 are provisionally rejected on the ground of nonstatutory

obviousness-type double patenting as being unpatentable over claims of copending

Application No.

10/665,670;10/050,494;10/841,174;10/963,166;10/961,719;11/263,749;11/198,618;11/1

98,538;11/197,982;11/001,796;11/178,047;11/198,866. Although the conflicting claims

are not identical, they are not patentably distinct from each other because they overlap

in subject matter pertaining to multiphase or striped personal compositions comprising

surfactants, emollients, particles or microspheres and/or electrolytes.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.


Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Necholas Ogden whose telephone number is 571-272-1322. The examiner can normally be reached on M-Th.

Art Unit: 1751

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Yogendra N. Gupta can be reached on 571-272-1316. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Nicholas Ogden
Primary Examiner
Art Unit 1751

No
1-27-06